BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL PAUL WIEHE Claimant	)	
VS.	)	
KISSICK CONSTRUCTION COMPANY Respondent	)	Docket No. 1,026,227
AND	)	
BUILDERS MUTUAL CASUALTY CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the January 9, 2009 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on April 22, 2009.

APPEARANCES

Christopher J. McCurdy, of Overland Park, Kansas, appeared for the claimant. C. Anderson Russell, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This claim stems from an accident that occurred on September 21, 2005 when the machine claimant was driving tipped over and ejected him from the cab. There is no dispute that the accident occurred, nor the fact that claimant had used marijuana and methamphetamine the evening before his accident. Rather, the focus of this appeal is on

respondent's contention that claimant's drug use, by virtue of K.S.A. 44-501(d)(2), precludes any award for workers compensation benefits.

The ALJ granted claimant an Award based upon a 28 percent permanent partial impairment[1] as well as past and future medical treatment associated with his accident. Respondent has appealed arguing that K.S.A. 44-501(d)(2) precludes any award in this matter. Simply put, respondent maintains that claimant's admitted consumption of marijuana and methamphetamine was sufficient evidence to warrant a conclusive finding of impairment under the statute, but also that his resulting impairment contributed to his accident as evidenced by the testimony of his co-workers and the respondent's expert witnesses. Thus, respondent contends the ALJ's Award should be reversed on all issues.

Conversely, claimant urges the Board to affirm the ALJ's Award in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This matter has been before the Board on three previous occasions. In each instance respondent denied the claim based upon either the safety device defense encompassed in K.S.A. 44-501(d)(1) or the drug defense encompassed in K.S.A. 44-501(d)(2). With each preliminary hearing decision the ALJ set out the facts of this case in great detail and the Board finds that in each instance, the ALJ's factual findings were accurate and supported by the record. Given this procedural stance, there is no need to reiterate the facts as they are well known to the parties. The Board expressly adopts the facts set forth in each of those Preliminary Hearing Orders as well as those reiterated in the Board's own Orders.

Suffice it to say that claimant was injured on September 21, 2005 at approximately 11:15 a.m. while working for respondent. He admits that he ingested both methamphetamine followed by marijuana 15-1/2 hours before his accident on September 21, 2005 and his positive drug test results are, by stipulation, admissible. The only issue for the Board to consider is whether claimant's statutorily presumed impairment by marijuana "contributed to" his accident.[2] A finding of presumed impairment is not

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[1] The parties stipulated before the ALJ that if this claim is compensable, he is entitled to a 28 percent permanent partial impairment to the whole body. Thus, the nature and extent of claimant's impairment is not at issue in this appeal.

[2] Although the initial drug tests revealed claimant had methamphetamine in his system, that test later proved negative. Only marijuana was conclusively established in claimant's system and it is that test result that the parties have stipulated into evidence.

enough to suspend an employer's obligation to pay for an otherwise compensable accident. The employee's impairment must be found to have "contributed to" the accident in order for the employer to take advantage of the statutory defense.

This very issue was the focus of the first preliminary hearing in the matter. At that hearing, the parties offered evidence from claimant as well as two of respondent's employees who witnessed the events immediately before claimant's accident. In its Order one member[3] framed the issue as follows:

> Essentially, what the Board must decide is if claimant's accident occurred because of impaired judgment or simply bad judgment. K.S.A. 44-501(d)(2) provides that an employer "shall not be liable under the workers compensation act *where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs...*"[4]

After considering the entire record *as it was developed at that time*, the reviewing Board Member was not persuaded that the evidence established that it was more likely than not that claimant's statutorily conclusive impairment contributed to cause his accident.[5] That Board Member noted that the record, again as it was developed at that time, failed to explain "how this level of marijuana affects an individual such as claimant and his ability to operate this sort of machinery."[6] She went on to note that "[t]he witness who was closest in proximity to claimant, Brad Lawson, failed to observe any abnormal behavior and although claimant's attempt at backing over this dirt may have been unusual, there is no evidence that this conduct is prohibited or that claimant had ever done work when impaired."[7] And Mike Eddings, the individual who saw claimant in passing that morning and testified claimant was acting "squirrely" was less than persuasive given his limited exposure to claimant. Similarly, Jack Staton's testimony was equally unpersuasive as he was found to be less than truthful by one Board member in one aspect of his testimony.

For these reasons, that Board Member found that respondent failed to establish it was more likely than not that claimant's presumed impairment contributed to his work-related accident.

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[3] K.S.A. 44-551 (i)(2)(A).

[4] Board Order, 2006 WL 546191 (Feb. 24, 2006).

[5] *Id.* at 4.

[6] *Id.* Claimant's blood was found to have 62 ng/ml immediately following the accident.

[7] *Id.*

After that preliminary hearing, additional evidence was procured. Respondent offered the testimony of an experienced heavy equipment operator and an addiction counselor to establish that claimant's drug impairment contributed to his accident.[8]

The ALJ reviewed this new and additional evidence and in a subsequent preliminary hearing Order concluded as follows:

> This case is in the same factual posture as it was following the January 6 hearing. The only apparent cause of the accident was the way the machine was operated. The machine operator was impaired by drugs. This is not enough to prove that the operator's impairment contributed to the accident. The respondent must have something more to show how the impairment contributed to the accident. The evidence produced by the respondent fails to show how the claimant's impairment contributed to the sheep's foot rolling over. The record did not demonstrate what physical or mental effects of THC played a factor in the occurrence of this accident.[9]

The ALJ did, however, deny claimant benefits under the theory that claimant's failure to wear a safety belt was a violation of a safety rule and under K.S.A. 44-501(d)(1), respondent was relieved of liability for the accident.

When that Order was appealed to the Board, the ALJ's findings and conclusions with respect to the drug defense were affirmed. However, the ALJ's conclusion as to the safety device was reversed.[10] That Board Member concluded that "[c]laimant's actions may well have been careless and negligent but the evidence does not rise to the level that his actions were intentional and deliberate."[11]

On the third presentation to the ALJ of this issue, again in an effort to achieve relief from this claim, respondent offered the testimony of Dr. Daniel Brown, a toxicologist who regularly testifies in legal/medical proceedings. Dr. Brown's testimony was summarized as follows:

> Distilled to its essence, Dr. Brown testified that claimant's conduct on the morning of his accident shows him to be "significantly impaired." [footnote omitted] And that significant impairment contributed to his accident. According to Dr. Brown, it is a well known fact that marijuana causes changes in a person's hand and eye coordination, causes impaired visual function, memory dysfunction and can impair their risk assessment ability. And according to him, these side effects last up to 24

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[8] Board Order, 2006 WL 2328102 (July 27, 2006).

[9] ALJ's Order (Apr. 27, 2006) at 2.

[10] Board Order, 2006 WL 2328102 (July 27, 2006).

[11] *Id.* at p 3-4.

> hours, or in the case of chronic users, weeks if not months. This is known as the "hangover effect", a phenomenon that has been generally recognized since 1985.
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> Dr. Brown further testified that in addition to the changes in hand and eye coordination and slower reaction times, he also based his opinion on the fact that claimant failed to use a seat belt, failed to communicate with his coworkers on the morning of the accident, and that claimant was using a machine in a way in which it was not intended to be used, that is, backing over a large hardened piece of dirt. And had claimant not been impaired by marijuana, he would have recognized the danger in using an unstable machine to back over a large piece of dirt.[12]

In response to this evidence, claimant offered the testimony of Dr. Curtis Klaassen, a board certified toxicologist from the University of Kansas Medical Center. He is also the University Distinguished Professor and Chair of the Department of Pharmacology, Toxicology and Therapeutics and KUMC. Dr. Klaassen testified that marijuana's effects would last approximately 4 hours and because claimant's ingestion of marijuana occurred approximately 15-1/2 hours before his accident, the drug's effects abated and were not a factor.[13]

The ALJ concluded that Dr. Brown's testimony was "more persuasive" and determined that claimant's use of marijuana and resulting impairment contributed to his accident. Thus, he denied claimant's request for further medical treatment based upon the drug defense encompassed in K.S.A. 44-501(d)(2).

That decision was appealed to the Board and after examining the evidence, a single member of the Board reversed the ALJ's determination and authorized further medical treatment. That Board Member observed that "[w]hile Dr. Brown makes a persuasive case for the effects of marijuana upon a worker's productivity and performance, even if one accepts Dr. Brown's opinions as fact, then it is wholly unclear how respondent's superintendents or claimant's co-workers could have missed claimant's purportedly significant impairment and the litany of side effects on the morning of this accident."[14]

That Order goes on to state:

> Put simply, there is ample evidence within this record to demonstrate that marijuana could cause an accident just like the one at issue in this claim. However, based upon that same record, this Board Member is not persuaded that claimant's cavalier use of marijuana [footnote omitted] contributed to the accident at issue. The time between the ingestion of the marijuana and the accident, the dispute

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[12] Board Order, 2007 WL 740393 (Feb. 9, 2007) at 2.

[13] *Id.* at 2.

[14] *Id.* at 3.

> between the experts as to the lasting effects of marijuana, coupled with the fact that even if you assume that claimant was impaired and accept Dr. Brown's view, there is an insufficiency of evidence to persuade this Board member that claimant's impairment contributed to his accident. Absent such evidence this Board Member cannot in good conscience deny the compensability of claimant's claim based on K.S.A. 44-501. Accordingly, respondent is responsible for benefits under the Act.[15]

At this point claimant has been rated and released from active treatment, although he continues to suffer from ongoing symptoms of his accident. The parties stipulated to a permanent impairment and proceeded to a Regular Hearing.

In making his final decision and award of benefits based upon the parties' stipulated impairment rating, the ALJ noted that no new evidence was offered to dispute the Board's earlier conclusion that respondent had failed to prove by a preponderance of the evidence that claimant's marijuana use contributed to his accident. In fact, all the evidence that came after that point in time serves only to support the Board's earlier decision. Claimant deposed Dr. Klaassen who further explained his underlying conclusion that claimant's use of marijuana did not contribute to his accident.

Dr. Klaassen testified that his area or research interest is how the body gets rid of xenobiotics and foreign chemicals.[16] Obviously, if the body did not get rid of these chemicals then effects would last forever.[17] He stated that he has not specifically studied or done research with marijuana, but the principles in relationship to how the body handles foreign chemicals are similar for marijuana as for many other chemicals with some differences.[18]

Dr. Klaassen opined that from a physiological standpoint when a person smokes marijuana it enters into the bloodstream and defuses into the blood and then the liver metabolizes it and the body gets rid of it. He broke down his explanation as follows:

> . . . So, first of all, the chemical diffuses in the brain and other parts of the body and then mainly the liver metabolizes it and we get rid of it. Now, what's really quite unique about marijuana in contrast to ethanol, the same general process happens with ethanol, but with ethanol there is always a very good correlation between ethanol concentrations in the brain and in the blood. . . .

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[15] *Id.* at 4.

[16] Klaassen Depo. at 9.

[17] *Id.* at 9.

[18] *Id.* at 10.

> What is very different now about marijuana is -- which is unfortunate -- is that there is not a good correlation between measuring marijuana concentrations, which is tetrahydrocannabinol, in the blood and what's in the brain and the effects that are being produced.
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> So, in essence, what happens with marijuana is that its effects are -- let's say come back to normal much, much sooner than does the blood levels. So there's, in essence, a discrepancy -- a normal discrepancy between blood levels and how impaired you are. So, for example, with ethanol, scientists know that there's a good correlation between blood levels and lack of ability to perform many functions, but with marijuana this does not occur.[19]

After reviewing this evidence, the ALJ concluded the respondent failed to prove by a preponderance of credible evidence that the claimant's use of marijuana contributed to the work injuries.[20] The Board has considered the parties' arguments along with the entire body of evidence included within the record and finds the ALJ's Award should be affirmed. To be clear, claimant's decision to consume illegal substances on the evening before his accident demonstrates a considerable lack of judgment. But based on the evidence contained within this record, there is little if any credible evidence that claimant's presumptive impairment contributed to his accident. There is no credible evidence that would suggest that claimant was acting erratically or unusually on the morning of his accident. He drove to work, apparently without incident. He began his work day at approximately 7:15 a.m. He worked continuously for four hours until the time of the accident. He was told to keep his machine moving which he did. One coworker points to his unusual approach to the spreading of this dirt pile, but the pictures reveal a significant pile of dirt with one large clod of dirt. It is not surprising that the machine claimant was operating, which both parties agree is unstable, would tip over as he was trying smooth the area out.

As was noted early on in this claim, claimant may have exhibited poor judgment in his method of operating the machine. But if claimant was so impaired as Dr. Brown suggests, one would expect at least one of his coworkers to say or do something to prevent him from continuing on with his job on that day long before he tipped the equipment over and was injured. Instead, all we are left with is an allegation that one coworker made eye contact with him at the moment of the accident and gestured in a manner telling him "no" and another coworker who alleges, after driving by him, that claimant was acting squirrely. And the last of respondent's witnesses was found to be less than straightforward with his testimony. Thus, none of these were persuasive on the issue of claimant's impairment or his ability - or inability - to perform his job duties on the day of his accident.

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[19] *Id.* at 10-12.

[20] ALJ Award (Jan. 9, 2009) at 4.

For these reasons, the ALJ's findings with respect to the application of the drug defense, K.S.A. 44-501(d)(2) is affirmed.

The ALJ also denied respondent's affirmative defense based upon K.S.A. 44-501(d)(1). K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[21] and the Court of Appeals in a more recent decision in *Carter*[22] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.' *Carter* at 85.

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[23]

The record shows that claimant concedes that he was not wearing the seatbelt at the time of his accident. And while that failure might have been unwise, there is nothing within this record that suggests claimant's actions were intentional or deliberate. Accordingly, that portion of the ALJ's Order is affirmed as well.

Finally, the ALJ ordered respondent to pay claimant's past medical bills, including an outstanding expense owed to Heartland Dental Group, subject to the statutory fee schedule. This finding is affirmed and similarly, claimant is entitled to future medical benefits subject to an appropriate application filed with the Division.

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[21] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[22] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[23] *Thorn v. Zinc, Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 9, 2009, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the majority's opinion and would reverse the ALJ's Award. This Board Member finds Dr. Brown's testimony on the issue of claimant's impairment and its causal connection to his accident to be persuasive. Claimant admits that he smoked marijuana with the blood test showing that claimant had 62 ng/ml in his system. Pursuant to K.S.A. 44-501(d)(2) he was presumptively impaired at the time of his accident. His questionable actions and demonstrable lack of judgment in operating the machinery on the morning of his accident lead to the conclusion that his impairment caused or contributed to his accident. Thus, respondent is not responsible for claimant's injuries.

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BOARD MEMBER

c: Christopher J. McCurdy, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge